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No. 84-1801

In the Supreme Court of the United States

OCTOBER TERM, 1985

INUPIAT COMMUNITY OF THE ARCTIC SLOPE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that whatever claims of aboriginal title and sovereignty petitioners may once have had over the Beaufort and Chukchi Seas of the Arctic Ocean have been extinguished.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 746 F.2d 570, and the opinion of the district court (Pet. App. A59-A90) is reported at 548 F. Supp. 182. Much of the reasoning of the court of appeals is set forth in its opinion in a companion case, *People of the Village of Gambell* v. *Clark*, 746 F.2d 572 (Pet. App. A5-A58).

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1984, and a petition for rehearing was denied on February 5, 1985 (Pet. App. A91-A92). The petition for a writ of certiorari was filed on May 6, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners contend that they have sovereign rights and unextinguished aboriginal title to the Beaufort and Chukchi Seas of the Arctic Ocean out to a distance of at least 65 miles from the coast of Alaska. Their complaint alleged that they have exclusively occupied that area since time immemorial; that as a result of such continuous and exclusive occupancy they have title and sovereignty over the surface ice and water column of the Beaufort and Chukchi Seas as well as exclusive rights, title, ownership, dominion, and sovereign jurisdiction over the seabed of the Outer Continental Shelf (OCS);[1] that their rights of sovereignty and ownership in the Beaufort and Chukchi Seas and the underlying seabed have not been extinguished; and that the offshore oil and gas activities of the United States and the private respondents (a number of oil companies) under the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, infringe their tribal sovereignty, trespass upon their lands, take their property and liberty without due process, violate their civil rights, breach a trust responsibility owed to them by the United States, abridge their religious freedom, and constitute a civil conspiracy.

All respondents moved for judgment on the pleadings. Following extensive briefing and a hearing, the district court, treating the motions as ones for summary judgment, granted judgment for respondents on all claims. Pet. App. A59-A90. After describing this action and the history of prior litigation between the parties (*id.* at A62-A66), the district court adopted the government's position that petitioners' claims are foreclosed by this Court's decisions in

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[1]The OCS consists of the submerged lands lying seaward and outside the area appertaining the states under the Submerged Lands Act, 43 U.S.C. 1301 *et seq.* It generally comprises the submerged lands beyond three miles from the coastline of the states. 43 U.S.C. 1301; *United States* v. *Louisiana*, 363 U.S. 1 (1960).

United States v. *Maine*, 420 U.S. 515 (1975); *United States* v. *Texas*, 339 U.S. 707 (1950); *United States* v. *Louisiana*, 339 U.S. 699 (1950); and *United States* v. *California*, 332 U.S. 19 (1947), which recognized and confirmed the paramount rights of the United States in ocean areas lying seaward of the ordinary low water mark. The district court rejected petitioners' argument that the Court's paramountcy cases did no more than resolve the competing claims of the United States and the states and left open comparable claims advanced by Indians. The court stated (Pet. App. A68-A69):

> To accept the interpretation now urged by the Inupiat would be to ignore the underlying principle upon which the Supreme Court has placed reliance, that federal supremacy over the adjacent seas is an essential element of national sovereignty. I therefore conclude that claims of sovereign power over the oceans whether made by one of the several states in the Union or by the Inupiat or by any other native tribe is [*sic*] inconsistent with national sovereignty and must fail.

The district court also rejected petitioners' claims because "[a]ny exercise of external sovereignty by the Inupiat in the area of the outer continental shelf would be inconsistent with their status as members of the United States and hostile to the interests of the nation as a whole" (Pet. App. A79-A80).[2]

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[2]The district court further held that the United States has no trust responsibility to protect Inupiat claims of title and sovereignty in the ocean, noting that the "Inupiat have no property rights in the area claimed and no treaty, statute or executive order has been offered to support the claim of a trust relationship" (Pet. App. A81). The court also observed (*id.* at A82) that petitioners were collaterally estopped from relitigating their trust claim by the decision in *North Slope Borough* v. *Andrus*, 642 F.2d 589, 611-612 (D.C. Cir. 1980), which held, inter alia, that whatever the source of the United States' trust responsibility to the Inupiats with respect to oil and gas development in

2. The court of appeals affirmed the judgment of the district court, but it based its decision on a different rationale.[3] Petitioners' claim to aboriginal title and sovereignty over the Arctic Ocean was consolidated for purposes of argument with a similar claim raised in *People of the Village of Gambell* v. *Clark*, 746 F.2d 572 (1984). In that case, plaintiffs challenged the Secretary of the Interior's decision to conduct an OCS oil and gas lease sale in Norton Sound, off the western coast of Alaska. Plaintiffs contended that the Secretary's decision had been made in violation of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120. Alternatively, plaintiffs contended that they possessed aboriginal title to substantial portions of the area proposed for leasing and that they had not consented to the leasing of the area purportedly owned, used, and occupied by them.

The court of appeals first disposed of the *Gambell* plaintiffs' aboriginal title claim (Pet. App. A9-A31). The court assumed without deciding that the plaintiffs had once possessed aboriginal rights to hunt and fish in the waters of Norton Sound (*id.* at A8, A50 n.1). The court concluded, however, that the Alaska Native Claims Settlement Act

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the Beaufort Sea, that responsibility had been fully satisfied. The court of appeals affirmed this ruling (Pet. App. A2), and petitioners have not pursued the issue in this Court. Finally, the district court rejected petitioners' religious freedom claim, concluding that it met neither of the two elements required by *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and that allowance of the claim would "result in the creation of a vast religious sanctuary over the Arctic seas beyond the state's territorial waters," causing "serious Establishment Clause problems" (Pet. App. A84, A86). Petitioners did not pursue their religious freedom claim on appeal, and the court of appeals had no occasion to address it.

[3]In the district court, the government had argued in the alternative for dismissal of the complaint on the grounds ultimately relied upon by the court of appeals, but the district court's reliance on this Court's paramountcy cases made it unnecessary for that court to reach any of the government's several alternative grounds for dismissal.

(ANCSA), 43 U.S.C. 1601 *et seq.*, which extinguished "claims of aboriginal title in Alaska," 43 U.S.C. 1603(b), applied to the Outer Continental Shelf (Pet. App. A8). Following an extensive analysis of the language and legislative history of the extinguishment provisions of ANCSA (Pet. App. A8-A31), the court concluded that Congress used the phrase "in Alaska" in Section 4(b) of ANCSA "to mean the geographic region, including the contiguous continental shelf and the waters above it, and not merely the area within the strict legal boundaries of the State of Alaska" (Pet. App. A15).

This ruling in *Gambell* applied as well to petitioners' aboriginal title claims in the instant case, and the court of appeals accordingly affirmed the judgment of the district court for the reasons set forth in the *Gambell* opinion (Pet. App. A2).[4] In addition, the court of appeals agreed that petitioners' "general [breach of] trust claims" were barred by collateral estoppel (*id.* at A2-A3). Finally, the court rejected petitioners' claims based on international covenants (*id.* at A3-A4 (citations omitted)):

> Assuming these international understandings are applicable, [petitioners] point to no provision of either that could be interpreted as imposing upon the United

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[4]In *Gambell*, the court of appeals went on to give the same construction to the phrase "in Alaska" as used in ANILCA that it had found applicable to ANCSA (Pet. App. A33-A47). The court concluded that Title VIII of ANILCA, which deals with subsistence hunting and fishing by rural Alaskans, was intended to have the same geographic scope as ANCSA (Pet. App. A33-A34). The court noted that legislators debating ANILCA on occasion used the phrase "in Alaska" to refer to the OCS (Pet. App. A34-A35), and the court also observed that Title VIII of ANILCA was adopted to benefit Natives (as well as other rural residents of Alaska). Accordingly, the court gave the phrase "in Alaska" a broad construction that benefitted the Natives (Pet. App. A43-A45). No issue concerning the proper construction of ANILCA is involved in the present case.

> States a greater obligation to protect the subsistence culture of the Natives than that imposed upon the United States by federal domestic law—an obligation already satisfied. Nor have [petitioners] made any showing of a universal recognition of such a greater obligation that would be necessary to establish a claim based on the law of nations.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, petitioners' claim is barred by numerous additional grounds that the court of appeals found unnecessary to reach. Accordingly, further review is not warranted.

1. a. Petitioners' principal attack on the court of appeals' decision is that it failed to apply the canon of construction calling for the resolution of statutory ambiguities in favor of Native claims. See, *e.g.*, Pet. 28-31, 47-52. That claim clearly does not warrant review in this case. In the first place, the court of appeals' companion decision in *Gambell* expressly applied the very principle for which petitioners argue (Pet. App. A43-A45). Thus, there can be no contention that the court of appeals was unaware of the general rule of construction upon which petitioners base their arguments. Instead, the court merely recognized that in the instant case the evidence of congressional intent to extinguish petitioners' claims was too clear to be overridden by a general rule of construction. This Court as well has recognized that the canon favoring resolution of doubtful issues in the Natives' favor is not an absolute. See, *e.g.*, *DeCoteau* v. *District County Court*, 420 U.S. 425, 444-445 (1975). Here, as in *DeCoteau*, 420 U.S. at 445, the " 'face of the Act,' " its " 'surrounding circumstances,' " and the

" 'legislative history' " all compel the conclusion that petitioners' aboriginal rights to the Arctic Ocean, if any, were extinguished with the passage of ANCSA.

More importantly, petitioners ignore the fact that Congress made plain its intent that courts apply a different rule of construction to the extinguishment provisions of ANCSA. The Conference Report stated (S. Rep. 92-581, 92d Cong., 1st Sess. 40 (1971)):

> It is the clear and direct intent of the conference committee to extinguish *all* aboriginal claims and *all* aboriginal land titles, if any, of the Native people of Alaska and the language of settlement is to be broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect challenge to land in Alaska.

Accordingly, there is no merit to petitioners' argument that the court of appeals applied an erroneous rule of construction in its analysis of their claim.

b. ANCSA was enacted to resolve the claims of Alaska Natives and to compensate them for relinquishment of their aboriginal rights, "if any." 43 U.S.C. 1603. In exchange for extinguishment, Congress gave the Natives almost $1 billion and 40 million acres of land, even though it is beyond dispute that Congress may extinguish aboriginal title without payment of *any* compensation. See, *e.g., Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 279 (1955). Against this backdrop, it is inconceivable that Congress could have meant to preserve the sweeping claims asserted by petitioners in this action. Section 4(b) of ANCSA, 43 U.S.C. 1603(b) (emphasis added), provides that "[a]ll aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, *including submerged land underneath all water areas, both inland and offshore,* and including any aboriginal hunting or fishing rights that may exist,

are hereby extinguished."[5] By this provision, Congress extinguished aboriginal title, if any, not only to the submerged lands of the territorial seas that are technically "in Alaska," but to the OCS as well.

Section 4(c) of ANCSA, 43 U.S.C. 1603(c), also extinguished aboriginal title to the OCS. That section provides that all claims against the United States "*based on* claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska * * *, are hereby extinguished." Under international law, the right to OCS resources belongs to the United States not on the basis of use or occupancy of the shelf or the seas above the shelf, but as an incident of the Nation's sovereignty over the contiguous coast. See Convention on the Continental Shelf, *done* Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578. Consequently, as a matter of law, ANCSA's extinguishment of aboriginal title to the coast—which petitioners do not contest—also extinguished

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[5]As the court of appeals noted (Pet. App. A21-A23), Section 4(b) of ANCSA was added to the bill that eventually passed Congress following a hearing at which a representative of the Western Oil and Gas Association expressed concern that the then-proposed language of extinguishment did not clearly encompass the OCS. In this regard, we note that petitioners' reproduction of the court of appeals' opinion omits a crucial portion of the hearing testimony relied upon by the court. The full portion of the opinion, which is reproduced in part at Pet. App. A22, actually provides as follows (746 F.2d at 577 (omitted material contained in second set of brackets; emphasis in original)):

> John Pickering * * * pointed out that some of the Native claims "purport to cover waters in addition to land areas" and "to effectuate a complete settlement, the claims should be extinguished as to water, as well as to land, areas." Mr. Pickering suggested this was true "for submerged areas beneath navigable waters in particular," and identified these as including "submerged areas beneath navigable waters [title over which was vested] in the State of Alaska under the grant made to it by the Submerged Lands Act (67 Stat. [29) as made applicable by the Statehood Act (72 Stat. 343), *or in the United States under the Outer Continental Shelf Lands Act* (67 Stat.] 462)."

aboriginal title, if any, to the OCS. This is so regardless of the fact that the OCS is not technically "in Alaska," because petitioners' claims to the OCS are unquestionably "based on" their extinguished claims to land and water areas within the geographic boundaries of Alaska.

2. In addition to the court of appeals' ruling that petitioners' claims were extinguished by ANCSA, it is clear, as the district court held, that petitioners' arguments are wholly incompatible with the paramountcy doctrine. Under that doctrine, ownership of the adjacent seabed and the natural resources therein appertain by virtue of the Constitution to the federal government as an essential element of national sovereignty. See, *e.g., United States* v. *Texas,* 339 U.S. 707, 717-718 (1950) (emphasis added):

> When Texas came into the Union, she ceased to be an independent nation. She then became a sister State on an "equal footing" with all the other States. That act concededly entailed a relinquishment of some of her sovereignty. The United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like. In external affairs the United States became the sole and exclusive spokesman for the Nation. *We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States.*

Assuming, arguendo, that petitioners at one time enjoyed sovereignty over and ownership of the Beaufort and Chukchi Seas, that sovereignty and ownership did not survive the acquisition of Alaska by the United States in 1867.[6] At that

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[6]The district court held that the Inupiats could not have acquired the rights claimed by petitioners prior to 1867, because "as late as 1876 the concept of territorial sovereignty over adjacent seas remained doubtful

time, Alaska became a part of this country, and ownership of the seabed and the resources therein was relinquished to the federal government. The paramountcy doctrine is every bit as applicable to petitioners' claims as it is to the claims of the states rejected by this Court. Federal paramountcy is an element of national sovereignty, and no subordinate domestic entity, be it a state or an Indian tribe, may interfere with that paramountcy. See, *e.g.*, *United States* v. *Louisiana*, 339 U.S. 699, 704 (1950); *United States* v. *California*, 332 U.S. 19, 29 (1947). It is, of course, a fundamental tenet of federal Indian law that tribes are not foreign states. *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 16-20 (1831). Thus, tribes enjoy only so much sovereignty as the United States chooses to acknowledge. *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). To the extent that any claim of Indian sovereignty is inconsistent with national sovereignty, therefore, it must fail of necessity, as a consequence of the Indians' being a part of our Union.

Significantly, the fact that this case involves the Nation's *external* sovereignty, *i.e.*, its standing as a member of the world community, distinguishes this case from earlier westward expansions of the United States' *land* territory. Petitioners' argument (Pet. 17-18) that because the United States acknowledged aboriginal title when it acquired new land territories it must do likewise in the ocean fails for the simple reason that there was no inconsistency between land-based aboriginal title and the United States' status as the sole external sovereign; the same cannot be said, of course, regarding the oceans. The United States has never deviated from the proposition that the Arctic is to be accorded the same high seas status as any other ocean, incapable of

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under international law" (Pet. App. A77, citing *United States* v. *California*, 332 U.S. 19, 31-33 (1947)). We agree with the district court's conclusion, but we need not address it because petitioners' claims are so clearly foreclosed by constitutional doctrine and federal Indian law.

occupation by anyone and fully subject to the principle of freedom of the high seas. See, *e.g.*, D. Pharand, *The Law of the Sea of the Arctic* 169-170 (1973); 62 Dep't of State Bulletin 610-611 (May 1970).[7] That determination is binding on petitioners.

Importantly, the paramountcy doctrine controls petitioners' claim of aboriginal title as well as their claim of sovereignty. In *United States* v. *Texas*, 339 U.S. at 719, the Court rejected Texas' attempt to separate *dominium* (ownership) from *imperium* (sovereignty). The Court stated (*ibid.*):

> It is said that * * * the sovereignty of the sea can be complete and unimpaired no matter if Texas owns the oil underlying it. Yet, * * * once low-water mark is passed the international domain is reached. Property rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign.

There can be no doubt that petitioners are *not* the national sovereign, and the paramountcy cases thus compel the conclusion that petitioners' claims to the Arctic Ocean are foreclosed as a matter of constitutional necessity.

3. There is yet a third reason why petitioners' claims are without merit. It is well settled that Congress may extinguish aboriginal title whenever it chooses. And while extinguishment is not to be lightly implied, it need not take any

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[7]Article 1 of the Convention on the High Seas, *done* Apr. 29, 1958, 13 U.S.T. 2314, T.I.A.S. No. 5200, to which the United States is a party, provides as follows: "The term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State." There is absolutely no reason to believe, and there is nothing in the legislative history of the Convention that suggests, that the Beaufort and Chukchi Seas, and the Arctic Ocean, were not intended to be covered by the High Seas Convention.

particular form; extinguishment occurs whenever the acts of the sovereign are inconsistent with continued aboriginal use and occupancy. *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 347, 354 (1941). Congress's passage of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, was just such an exercise of sovereign power. The Act declared the continental shelf to be subject to the exclusive jurisdiction of the United States and to its power of disposition as therein provided (43 U.S.C. 1332); extended the laws of the United States to the subsoil and seabed of the Shelf and to development structures located thereon (43 U.S.C. 1333); and authorized the Secretary of the Interior to promulgate rules and regulations and otherwise provide for the management and development of the mineral resources of the Shelf (43 U.S.C. 1334). The Act also authorized the Secretary to issue leases and established parameters for some of the terms and conditions of the leases to be granted under the Act (43 U.S.C. 1337). Congress specifically declared that "mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions" of that Act (43 U.S.C. 1333(a)(1)). All funds received from development of those resources go into the miscellaneous receipts account of the Treasury for the benefit of the Nation (43 U.S.C. 1338).

The detailed and comprehensive scheme thus established by Congress was an exercise of complete dominion and control by the federal government over the natural resources of the OCS. Moreover, the scheme is, on its face, adverse to any claim by petitioners to sovereignty or ownership. All authorities under the Act are vested in the Secretary of the Interior and other federal officials. There is no provision for or recognition of the rights of petitioners or other Indian people in this exclusively federal scheme. Indeed, the Act repudiated the very sovereignty upon which petitioners rely to establish their right to the mineral resources of the OCS

by specifically disclaiming sovereignty and ownership of the waters above the shelf (43 U.S.C. 1332(2)). Accordingly, petitioners' aboriginal rights, if any, were completely extinguished by the passage of OCSLA.[8]

4. There is no merit to petitioners' argument (Pet. 52-54) that their claim is protected by international law. First, the International Covenant on Civil and Political Rights, U.N. G.A.O.R., 21st Sess., Supp. No. 16 (A/6316), at 52 (1966), upon which petitioners rely (Pet. 53), has never been ratified by the United States. Second, that document, and others like it, were never intended to create private rights of action enforceable in domestic courts. See, *e.g., Frolova* v. *Union of Soviet Socialist Republics,* 761 F.2d 370, 373-375 (7th Cir. 1985); *Tel-Oren* v. *Libyan Arab Republic,* 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, No. 83-2052 (Feb. 25, 1985). Finally, as the court of appeals observed (Pet. App. A3-A4), the International Covenant, even if applicable, imposes no greater obligations on the United States to protect the interests of petitioners than are already imposed by domestic law, and it has been conclusively resolved through exhaustive litigation that those obligations have been fully satisfied. *California* v. *Watt,* 668 F.2d 1290, 1324-1325 (D.C. Cir. 1981); *North*

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[8]Petitioners argue (Pet. 25-26 n.7) that the Act's savings clause, 43 U.S.C. 1342, expressly preserved their claims. But the clause protects only prior existing *rights* in the OCS, and it is clearly settled that aboriginal title is not a "right" against the United States. *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. at 279. In addition, the legislative history of the savings clause indicates that Congress's sole purpose was to avoid affecting, one way or the other, pending claims under the Mineral Leasing Act that were later resolved in *Justheim* v. *McKay,* 229 F.2d 29 (D.C. Cir. 1956). See S. Rep. 133, 83d Cong., 1st Sess. 17, 21 (1953); S. Rep. 411, 83d Cong., 1st Sess. 26, 37 (1953); *Outer Continental Shelf: Hearings on S.1901 Before the Senate Comm. on Interior and Insular Affairs,* 83d Cong., 1st Sess. 704 (1953).

Slope Borough v. *Andrus*, 642 F.2d 589, 611-613 (D.C. Cir. 1980).[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1985

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[9]In any event, petitioners' claim (Pet. 54) that the United States, by developing OCS resources, is taking action that "knowingly furthers the extinction of a Native people" is grossly exaggerated. Congress has enacted a host of statutes that include provisions to protect petitioners' environment and their subsistence livelihood. See, *e.g.*, Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*; Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*; Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*; International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849. If petitioners believe that these statutes are being violated, they are free to bring suit challenging particular governmental actions as, indeed, they have done in the past. But any such claims have no bearing on this lawsuit, except to underscore the complete inapplicability of petitioners' sweeping allegations under international law.